This is especially important for the "intricate" Social Security Act, with its "byzantine construction." Schweiker v. Gray Panthers, supra, 101 S.Ct., at 2640. Thus,

> "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." Batterton v. Francis, supra, 432 U.S., at 425 (emphasis supplied; citation and footnote omitted).

Even if Iowa could do so, it would not be sufficient for it merely to demonstrate the reasonableness of its statutory interpretation. Herweg v. Ray, 619 F.2d 1265, 1277 (8th Cir. 1980) (McM. Op.) That Iowa's interpretation of this federal statute might be reasonable is irrelevant.

Defendants can succeed in this case only if they can overcome the increased burden inherent in attacking federal regulations that have "legislative effect."

In addition to its effort to shift the focus by ignoring the applicable Batterton standards, Iowa has also confused the issues by mischaracterizing the role of the states in the federal Medicaid program. The gist of Iowa's argument is that its actions are imbued with its inherent power as a state, and that power supersedes the power of the Secretary in the Medicaid program.[3/] Medicaid is not, however, simply a state program. It is, as this Court has consistently recognized, a federal-state cooperative program.

3/ See, e.g., Respondents' discussion, at 20-22, with regard to the differences between the SSI and Medicaid programs and the state's role in each of those programs.

Schweiker v. Gray Panthers, supra, 101 S.Ct., at 2636; Harris v. McRae, 448 U.S. 297, 301 (1980).

A federal-state cooperative program is a congressionally enacted system providing federal matching funds as long as states meet federally mandated requirements. Congress provides latitude for the states to structure their programs to suit their individual needs and conditions, but the states are still limited by federal statute and regulations. Schweiker v. Gray Panthers, supra, 101 S.Ct., at 2636; accord, Townsend v. Swank, 404 U.S. 282, 286 (1971).

Of course, states are not required to participate in the Medicaid program. They may also, as petitioners pointed out in their opening brief, at 6-9, accept or reject various options of the federal Medicaid program. But, if a state does

accept the dollars offered by Congress, it "must comply with the requirements imposed both by the Act itself and the Secretary . . . ." Schweiker v. Gray Panthers, supra, 101 S.Ct., at 2636 (emphasis supplied).

If Iowa's analysis of the state's role in Medicaid were upheld by this Court, it would result in chaos for the federal government, the entity that established the program and remains its primary financial supporter. States would then be free, as amicus Gray Panthers has pointed out at 26-27 of its brief, to develop numerous rules and eligibility conditions which are inconsistent between the states, as well as contrary to federal regulations. Rather than hold down costs, as Iowa implies (Respondents' Brief, at 33), such a system would provide no means for the federal government to control its expenditures

under Medicaid.

II. THE SECRETARY'S REGULATIONS ARE REASONABLE IN LIGHT OF THE SSI-MEDICAID LINK AND THE NEED FOR ADMINISTRATIVE EFFICIENCY.

Petitioners, as well as the United States, have closely analyzed the congressional intent underlying the Medicaid program and demonstrated that the Secretary's regulations are reasonable and consistent with that intent. Iowa has offered no new arguments to support its position. Nearly all of their contentions are reflected by Judge Ross in his opinion below and have been thoroughly addressed in the briefs of petitioners and the United States.

Iowa continues to try to sidestep the realities of the SSI-Medicaid link. 42 U.S.C. § 1396a(a)(10). The import of the link, as petitioners and the United States

have emphasized, is that "all recipients of categorical welfare assistance -- now SSI -- were entitled to Medicaid." Schweiker v. Gray Panthers, supra, 101 S.Ct., at 2637; see also Beltran v. Myers, 101 S.Ct. 1961, 1962 n.3 (1981); Beltran v. Myers, supra, 101 S.Ct., at 1963-1964 (Stevens, J., concurring); Blum v. Caldwell, 100 S.Ct. 1635, 1636 (Marshall, J., In Chambers 1980).

Iowa does not deny that the federal regulations effect that requirement, but it points to other congressional action in an attempt to evade the SSI-Medicaid link. Iowa's illustrations, however, support petitioners' position, rather than defendants'. For example, Iowa cites the recent congressional action with regard to Medicaid transfer of assets rules as supporting its position. Pub. L. 96-611, § 5, 94 Stat.

3567 (1980). Respondents' Brief, at 26-27. But that legislation, contrary to Iowa's assertion, reflects the continued congressional policy of requiring those eligible for SSI also to be Medicaid eligible and mandating that Medicaid rules not be more restrictive than those under SSI. Thus, Congress specifically required in that legislation that whatever Medicaid transfer rules are adopted by states, they may not be more restrictive than those established by Congress and the Secretary under SSI. See 42 U.S.C. § 1396a(j)(1), added by Pub. L. 96-611, § 5(b), 94 Stat. 3568 (1980); see also 126 Cong.Rec. S16506 (remarks of Sen. Long, 1980). As a result, no person who transfers assets and remains eligible for SSI will be deprived of Medicaid for

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the same assets transfer.[4/]

The Secretary's interpretation of the deeming rules comports with this congressional philosophy and goal. The deeming rules used in state Medicaid plans cannot result in more restrictive treatment than do the deeming rules used in the SSI program. Iowa's approach has the contrary result; it allows for an SSI recipient to be deprived of Medicaid benefits. Such a result is not only inconsistent with the SSI-Medicaid link, but also violates

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4/ Indeed, even the one exception to this rule, which allows states to employ a longer period of Medicaid ineligibility than SSI ineligibility for transfers of assets worth more than $12,000, 42 U.S.C. § 1396a(j)(2), also supports petitioners. When Congress intends an exception to the general rule requiring no more restrictive Medicaid rules than SSI rules, it explicitly sets out that exception. See also Schweiker v. Gray Panthers, supra, 101 S.Ct., at 2637-2638, discussing the "§ 209(b)" exception to the general rule.

Congress' general policy favoring the interrelationship of Medicaid and SSI.

Iowa has also implied that the SSI-Medicaid link is the only reason to support the Secretary's regulations. Consequently, the state argues that since the Secretary has improperly interpreted the link, there is no further basis for the federal regulations.

Iowa's own statements belie this argument. An important reason for both the SSI and corresponding Medicaid deeming policy is administrative convenience. The Secretary has determined that a simple formula (the one-month and six-month rules) meets the congressional directive and also provides for the necessary simplified and reasonable administration of the program. As this Court observed in Gray Panthers:

> "The administration of public assistance based on the use of

> formula is not inherently arbitrary. Cf. Weinberger v. Salfi, 422 U.S. 749, 781, 782, 784, 95 S.Ct. 2457, 2475, 2476, 45 L.Ed.2d 522 (1975) . . . . To require individual determinations of need would mandate costly fact-finding procedures that would dissipate resources that could have been spent on the needy. Id., at 784, 95 S.Ct., at 2476." Schweiker v. Gray Panthers, supra, 101 S.Ct. at 2642; see also 49 Fed.Reg. 82254, 82257 (1980).5/

Defendants themselves now concede the validity of that position. They note, Resp. Br., at 11 n.4, that the individualized

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5/ The court of Appeals' decision in Gray Panthers, 629 F.2d 180 (D.C. Cir. 1980), required the Secretary to consider specified "relevant factors" in promulgating new deeming regulations for the § 209(b) states. The Secretary did that, and also considered "additional factors", one of which was administrative ease. See 49 Fed. Reg. 82256 (1980). The Secretary decided to use the SSI-type deeming regulations as the most restrictive that a § 209(b) state could employ, noting that that method "advance[s] the statutory goal of simplicity of administration and efficient operation of the Medicaid program." Id., at 82257 (2d col.).

determinations ordered by the district court have resulted in "administrative costs [that] seem to have exceeded the gains of the case-by-case policy".[6/]

The Secretary's rules take that fact into consideration and carefully balance the requirements of SSI and Medicaid congruence with the need for administrative

---

6/ Iowa is apparently considering using these additional administrative costs as a reason for ignoring the lower court's order. The state contends that because, in its view, Gray Panthers does not mandate individual dterminations, it can change its rules despite the failure to appeal the district court's order. Resp. Br., at 11 n.4. But that option is not available to the state.

This court recently reiterated that the failure to appeal a decision binds the losing party, regardless of later decisions of higher courts in other cases on the same or similar issues. Federated Dept. Stores, Inc. v. Moitie, 101 S.Ct. 2424, 2427 (1981). Iowa's failure to appeal the district court directive has rendered that holding res judicata; subsequent legal analysis does not provide a basis for violating the district court's directives.

simplification. These rules provide a reasonable balance between administrative need and congressional directive and are not, under the Batterton-Gray Panthers analysis, arbitrary, capricious or beyond the authority granted the Secretary.

CONCLUSION

For the reasons set out in this and in Petitioners' opening brief, the decision of the Court of Appeals should be reversed.

December, 1981.

Respectfully submitted,

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No. 80-60

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELVINA HERWEG, et al.,

Petitioners

vs.

ROBERT D. RAY, et al.,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE GRAY PANTHERS

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No. 80-60

IN THE

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ELVINA HERWEG, et al.,

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BRIEF AMICUS CURIAE ON BEHALF OF THE GRAY PANTHERS

INTEREST OF AMICUS CURIAE

The Gray Panthers are an unincorporated national organization whose members are concerned about the quality of life of older Americans. To that end, the Gray Panthers engage in extensive litigative and legislative advocacy on behalf

of elderly persons throughout the country. See Schweiker v. Gray Panthers, ___ U.S. ___, 101 S.Ct. 2633, 2638 (1981).

Many members of the Gray Panthers are Medicaid recipients, and as a result, the organization is committed to ensuring that states administer their Medicaid programs in a manner which conforms to federal requirements. Ibid.

Medicaid benefits are of crucial importance to low-income elderly persons who receive nursing home care on an ongoing and uninterrupted basis. Without nursing home care, some will die and others will require frequent and prolonged hospitalizations.

This case concerns the state of Iowa's rather unique Medicaid deeming policies between a spouse who is in an institution and a spouse and children living at home. Iowa's deeming policies are unusual as discussed below at pp. 13, 14 and 16 because they differe significantly from the

Medicaid deeming policies in the thirty-three other "SSI states" and the fifteen other "209(b) states." As a result of the application of these policies, Petitioner Ms. Elvina Herweg was at one point wholly denied Medicaid eligibility for nursing home care. Herweg v. Ray, 619 F.2d 1265, 1268 (8th Cir., 1980). These deeming policies would have then left Mr. Darrell Herweg and his three daughters with a debt of $300 each month after meeting the costs of Ms. Herweg's nursing home care and before meeting any of their own subsistence needs. Ibid at 1268.

Amicus is gravely concerned about the adverse impact which the decision of the United States Court of Appeals in the present case will have on Medicaid recipients who are members of the Gray Panthers. Elderly recipients, some of whom are in nursing homes, and some whose spouses are in nursing homes are affected by the deeming policies at issue in this case.

Some may lose Medicaid eligibility depending on the results of this case. Others may be forced to live at greatly reduced subsistence standards.

The split decision of the Court of Appeals in the case at bar affects not only elderly Medicaid recipients in Iowa. The decision by this Court could affect elderly Medicaid recipients in thirty-three other states which currently follow the deeming policies applicable to the Supplemental Security Income Program (SSI).

Because of the importance of this case, the Gray Panthers present herewith a brief containing an examination of the critical federal Statutory policies at issue. This brief addresses in turn (1) the fundamental Medicaid requirement that the states cover all categorically needy public assistance recipients, (2) the basic equity requirements of the Medicaid statute mandating that states evaluate income, need, and resources in a comparable fashion for all indigent persons

covered by the Medicaid programs and (3) the impact of a decision in this case on Medicaid beneficiaries in the thrity-three other states which extend Medicaid coverage to all SSI beneficiaries (the SSI states).

Amicus is represented by counsel who specialize in health law in general, and Medicaid law in particular.

Most importantly, amicus brings to this Court a national perspective on a case of great magnitude for millions of Medicaid beneficiaries throughout the country.

ARGUMENT

I

IOWA'S DEEMING POLICIES VIOLATE CONGRESS' FUNDAMENTAL GUARANTEE OF MEDICAID COVERAGE FOR CATEGORICALLY NEEDY PUBLIC ASSISTANCE RECIPIENTS

When Congress established the Medicaid program in 1965, it required states that wished

to receive federal matching funds to meet certain federal minimum requirements. At the same time, Congress also set the maximum parameters for which a state can receive federal matching funds to provide health care to the indigents. The irreducible or basic minimum which all states had to provide to qualify for federal Medicaid funds were the five basic mandatory services for all federal public assistance recipients under the Old Age Assistance, Aid to the Permanently and Totally Disabled, Aid to the Blind and Aid to Families with Dependent Children programs. 42 U.S.C. §1396a(a)(10)(a) and (13)(B). These mandatory eligibles are hereinafter referred to as the categorically needy.[1/] Congress gave the

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1/ Conress gave states the option to provide Medicaid coverage to persons with incomes and resources equal to or lower than the federal public assistance levels, who were categorically linked to the federal public assistance programs but who for one reason or another were not actually receiving public assistance. 42 C.F.R. 435.200-.231. These are referred to as the categorically needy options. The

(cont.)

states the option to cover categorically linked individuals who had incomes and resources somewhat above the federal public assistance levels but whose incomes were inadequate to secure needed medical care. 42 U.S.C. §1396a(a)(10)(C). This group is referred to as the medically needy and is covered by 30 states but not Iowa. Congress further gave states the option

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1/ (cont.)

categorically needy options include a number of different sub-groups, and states may choose which of the subgroups to cover. The subgroups include: persons who would be eligible for AFDC or SSI but have chosen not to apply; persons who would be eligible for AFDC or SSI but for their residence in a nursing home or other institution; recipients of optional state supplementation to SSI payments, children in foster care, subsidized adoptive homes, unemployed families, and intact families; unborn children; persons in nursing homes whos gross incomes are less thatn 300% of the SSI need level. 42 C.F.R. 435.200-.231. Iowa's selection of subgroups appears at CCH Medicare-Medicaid Guide §15,586. Iowa's choices include the following subroups for which Ms. Herweg is eligible but for Iowa's deeming policy: persons who would be eligible for SSI but for their residence in a nursing home or other institution, and persons in institutions whose gross income is less than 300% of the SSI needs level. 42 C.F.R. 435.211, and .231.

to cover 12 optional services for the categorically needy and medically needy. 42 U.S.C. §1396a (a)(13), and 1396d(a)(6-17). Within these maximum and minimums, states had flexibility to design their Medicaid programs to best meet the availability of revenues and the health needs of the poor.[2/]

From the inception of the Medicaid program to the present, the requirement to cover the categorically needy[3/] has been the foremost concern of Congress:

2/ States who chose to participate in the program were required to make progress from the basic minimum of the mandatory services to the categorically needy towards and to achieve by 1975 comprehensive coverage of all optional eligibles and optional services. 42 U.S.C. 1396a(d), repealed by §231 of the Social Security Amendments of 1972, P.L. 91-603.

3/ Congress' particular concern to ensure Medicaid coverage for the categorically needy was firmly historically rooted. From 1935 to the present, Congress had either set or was thoroughly familiar with the categorical eligibility requirements, the need levels, income disregards and

(cont.)

> Under the committee bill, a State plan to be approved must include provision for medical assistance for all individuals receiving aid or assistance under State plans approved under titles I, IV, X, XIV, and XVI. It is only if this group is provided for that States may include medical assistance to the less needy. H. Rep. No. 213, 89th Cong. 1st Sess., 1965 U.S. Code Cong. and Admin. News p. 2017.

3/ (cont.)

resource standards required by Congress and used by the states. See 42 U.S.C. §301 et seq.; §1201 et seq. and §1351 et seq. With some variation, Congress simply transposed these familiar eligibility requirements into the Medicaid program. See 42 U.S.C. §1396a(a)(17); H. Rep. 89-213, 1965 U.S. Code of Cong. and Ad. News pp. 2017-18. The historical consensus that the aged, blind, disabled and children receiving public assistance were the deserving poor, the neediest of the needy, who had no other recourse to secure medical care was certainly a contributing factor in Congress' decision. See pp. 9-12 supra. Moreover, since all states already had the federal public assistance programs, and since many already paid for some medical care to the categorically needy aged under the Kerr-Mills program and paid for some medical care to the categorically needy families, and blind and disabled individuals through vendor payments, Congress made an easy-to-understand offer to states: the federal government would match from 50 to 83% of the costs of a basic package of medical services to the same group of eligibles for whom the federal and state governments already were making subsistence payments on a matching basis. H. Rep. 89-213, supra.

In 1967, Congress, disturbed at the growth of some states' expenditures for the medically needy which it believed were imperiling coverage for the categorically needy public assistance recipients, set a cap on states' medically needy need levels. See 42 U.S.C. § 1396b(f) 42 C.F.R. 435.1007. The Senate Report review the problem as follows:

> The tendency of some States to identify as eligible for medical assistance under title XIX large numbers of persons who could reasonably be expected to pay some, or all, of their medical expenses . . . has developed future cost projections of a level totally inconsistent with the expectations of the Congress when it enacted itile XIX in 1965. . ..
>
> Under the committee bill, the full Federal medical assistane percentage would continue to be available for medical assistance granted to those persons most in need. . .
>
> 1. Cash assistance recipients;
> 2. Persons eligible for cash except that they do not meet durational residence requirements;
> 3. Children under 21 eligible for AFDC except for age or school attendance requirements; and
> 4. Individuals in medical

> institutions who would qualify for cash assistance if they lived outside of the institutions. . . .
>
> However, with respect to the medically indigent -- those whose income is too high for them to be characterized by a State as in need of welfare -- there would be substantial cutbacks in Federal matching funds S. Rep. No. 744, 90th Cong., 1st Sess., 1967 U.S. Code of Cong., and Ad. News 3012-14. (Emphasis added.)

Thus in 1967, Congress, facing its initial Medicaid funding crisis, reaffirmed its intent to ensure complete Medicaid coverage for the categorically needy and the categorically needy options. Ibid; see also 1967 U.S. Code of Cong. and Admin. News 3020.[4/]

4/ In rejecting proposals to impose copayments on the categorically needy, the Senate said: "It would not be appropriate to impose such charges upon cash assistance recipients because such persons have been determined to have no income or resources available to meet such charges." Ibid; 1967 U.S. Code of Cong. & Admin. News at 3024.

Two years later, Medicaid's fundamental guarantee to the categorically needy was reiterated when Congress, this time responding to state cries of fiscal distress, extended the time period for the states to make progress towards a comprehensive program of all eligibles and all services. See P. L. 91-56 §2d; the Social Security Amendments of 1969.

> The committee wants to make it clear that its amendment in nowise affects the obligation of a State to provide at least the five basic services now required under present law for cash assistance recipients. S. Rep. 91-222, 91st Congressional and Administrative News 1079.

In 1972, Congress passed the SSI program which consolidated the public assistance programs for the aged, blind, and disabled into a single national program. See 42 U.S.C. 1381 et seq. In that context Congress amended the Medicaid statute to require states to provide categorically needy Medicaid coverage for SSI eligibles. See P. L. 93-233 §13(a)(3) codified at 42 U.S.C.

§1396a(a)(10)(a). The only exception permitted to full Medicaid coverage of the SSI eligibles was for those states which selected the "209(b)" option of covering all the SSI-linked needy on a spend down basis.[5/]

SSI was to be financed exclusively through federal dollars; the need levels, income disregards, and resource standards would be established by Congress and the Department of Health and Human Services (HHS); the standards would be uniform, and they would be uniformly administered by HHS throughout the country. Schweiker v. Gray Panthers, 101 S.Ct. 2633, 2637. While SSI would extinguish states' future obligation to pay for the subsistence needs of the aged, blind, and disabled, some states feared that the eligibility improvements mandated by the new SSI standards would balloon their numbers of categorically

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5/ Section 209(b) of the Social Security Amendments of 1972 is codified at 42 U.S.C. §1396a(f).

needy Medically eligibles.[6/] Ibid; See S. Rep. 553, 93rd Cong., 1st Sess., 56, 1973 U.S. Code of Cong. and Admin News p. 1383-4. These state fears persuaded Congress to enact the 209(b) Medicaid need levels and resource standards disability criteria and income disregards in determining Medicaid eligibility for the SSI categorically needy and the SSI linked medically needy. However, to protect the integrity of 1396a(a)(10)(a)'s commitment to cover the categorically needy, a state choosing the 209(b) option (1) is required to allow SSI eligibles and all other SSI-linked persons to "spend down,"[7/] and (2) is mandated to disregard all SSI income in determining Medicaid

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6/ Due to the federal comparability requirements discussed subsequently, the improvements in SSI and thus Medicaid categorically needly eligibility would also be mandated for the SSI linked medically needy. See 42 U.S.C. §1396a(a)(17); 42 C.F.R. 435.812, .822, .831, and .840.

7/ Spend down allows a person with income above the state's need levels to achieve Medicaid

(cont.)

eligibility criteria more restrictively than it did for categorically needy public assistance recipients on January 1, 1972. 42 U.S.C. §1369a(f); 42 C.F.R. 435.731 and .732.

Iowa has not chosen the 209(b) option and does not permit persons eligible as categorically needy or as categorically needy options to spend down. If it had, Ms. Herweg would be able to spend down and become Medicaid eligible. See Herweg v. Ray, 619 F.2d 1265, 1290-1 (8th Cir. 1980).

Iowa is an SSI state and has agreed to accept the SSI need levels, SSI resource standards, SSI income and disregards, and SSI disability criteria. Ms. Herweg's income and resources are such that

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7/ (cont.)

eligibility once his incurred medical expenses reduce his income to the state's need level. Spend down is always a requirement in the medically needy program; however, in 209(b) states, the categorically needy options, and the medically needy who are SSI-linked must all be permitted to spend down. 42 C.F.R. 435.732, and .831.

she would qualify for SSI and is thus categorically needy. Ibid at 1291-2. Iowa's failure to provide Medicaid coverage for a categorically needy eligible due to its unique deeming policy violates 42 U.S.C. §1396a(a)(10)(a)'s historic guarantee of Medicaid coverage for persons eligible for the federal public assistance categories.

II

IOWA'S DEEMING POLICY VIOLATES THE MEDICAID COMPARABILITY STATUTE

When Congress adopted the Medicaid program, one of its prime concerns was to ensure a substantial measure of intra-state equity. By equity, amicus refers to the concept both in social welfare policy and in law that persons in similar circumstances should be afforded similar treatment, and that persons in identical circumstances should be afforded identical treatment.

Under Kerr-Mills and the public assistance vendor payment programs which preceded Medicaid, eligibility factors and the scope of services varied widely among the aged, blind, disabled, and families. Congress determined that Medicaid eligibility and services would be provided on a comparable and equitable basis between and among the categorically needy public assistance categories, as well as between the categorically and medically needy. This was codified in 42 U.S.C. §1396a(a)(10), (13), and (17).

The comments of the House Committee Report are most instructive:

> This will assure comparable treatment for all of the needy aided under the federally aided categories of assistance . . . .
>
> This was included in order to make sure that the most needy in a State receive no less comprehensive care than those who are not as needy. . . .
>
> Thus, the income and resources limitation for the aged must be comparable to that set for the disabled and blind and must also have a comparability for

that set for families with children who, except for their income and resources, would be eligible for AFDC.

Although States may set a limitation on income and resources which individuals may hold and be eligible for aid, they must do so by maintaining comparability among the various categorical groups of needy people. Whatever level of financial eligibility the State determines to be that which is applicable for the eligibility of the needy aged, for example, shall be comparable to that which the State sets to determine the eligibility for the needy blind and disabled; and must also have comparability to the standards used to determine the eligibility of those who are to receive medical assistance as needy children and the parents or other relatives caring for them. H. Rep. 89-213, 1965 U.S. Code of Cong. and Admin. News 2017-18.[8/]

8/ Since 1965, Congress has made only two exceptions to comparability. In 1967, Congress allowed states to provide more comprehensive coverage to the aged whom the state bought in to Medicare Part B and allowed the states to provide the medically needy with a different basic package of 7 out of the 17 Medicaid services so long as the package did not exceed the services offered to the categorically needy. See 42 U.S.C. §1396a(a)(10)(c) and (13)(C); S. Rep. No. 744, 90th Cong., 1st Sess., 1967 U.S. Code of Cong. and Admin. News 3019-20.

(cont.)

HHS (then HEW) implemented the federal comparability mandates by a straight-forward set of regulations. In SSI states, the eligibility for the categorically needy options must be assessed under the same need levels, income disregards, and resource standards as the categorically needy to whom they are linked. 42 C.F.R. 435.711 et seq. Financial eligibility for SSI recipients and for SSI linked categorically needy options are determined identically to each other. 42 C.F.R.

8/ (cont.)

In 1981, Congress allowed states to redesign their medically needy programs by repealing some of the comparability limitations on selection of services for the medically needy codified at 42 U.S.C. §1396a(10)(c). This change is not relevant to this case because Iowa has no medically needy program. However, the language of the conference committee report shows the continuing concerns of both the House and the Senate that eligibility be determined comparably. "Moreover it is not the intent of the Conference to alter the requirements under 1902 (a)(17) of the Social Security Act relating to comparable treatment of income and resources between categorically and medically needy programs." 1981 Congressional Record H-5804, H-5813 (Reps. Waxman and Dingell) (July 31, 1981).

435.721-.725. Financial eligibility for medically needy SSI-linked recipients are determined under need levels, income disregards, and resource standards which are either identical to or more liberal than those used in determining eligibility for the SSI and AFDC categorically needy. 42 C.F.R. 435.812, .822, .831 and .840.

The comparability provisions governing the 209(b) states eligibility standards are the same. Eligibility for the aged, blind and disabled categorically needy options must be assessed under the same need levels, disregards, and resource standards as the categorically needy aged, blind and disabled. 42 C.F.R. 435.731-.734. In 209(b) states, financial eligibility for medically needy aged, blind and disabled recipients must be determined under need levels, income disregards, and resource standards which are identical to or more liberal than the most liberal standards used in determining Medicaid eligibility for the aged,

blind, and disabled categorically needy or the 1972 standard whichever is higher. 42 C.F.R. 435.812(c), .831(a)(3), and .840(b).

Iowa's deeming policy violates the federal comparability requirements because it uses a different deeming policy for the categorically needy to whom they are linked. No other SSI or 209(b) state has adopted such a policy; it is both clearly inequitable and a violation of comparability. See 42 U.S.C. §1396a(a)(17) and 42 C.F.R. 435.721 and .723(d).

For Iowa to make Ms. Herweg's eligibility dependent on whether she applies at the Social Security Administration office or the local welfare office is to set at naught the comparability principle which was and is at the heart of the enactment and administration of the Medicaid program.

III

CONCLUSION

The crux of the dispute between Ms. Herweg and the state of Iowa is that Iowa asserts it is free to apply a more restrictive income disregard under its deeming rules than is permitted for "SSI states" under the Medicaid program. Under the SSI program and under the Medicaid program in "SSI states," income may be deemed from a spouse at home to a spouse in an institution for one month only. 42 U.S.C. §1382c(f)(1); 20 C.F.R. 416.1185(e)(1); 42 C.F.R. 435.723(d). After one month, the income must be disregarded. Ibid. This is referred to as time restricted deeming. Under Iowa's Medicaid plan, income may be deemed from a spouse at home to a spouse in an institution without any time restrictions. Under this court's ruling in Schweiker v. Gray Panthers, 101 S.Ct. 2635 (1981), Iowa can lawfully deem this income

without time restrictions, if it chooses a 209(b) state.[9/] This it has not chosen to do. It has chosen instead to set its policy at variance not only with the Medicaid and SSI deeming rules but also at variance with every other "SSI state." The Iowa legislature and Department of Social Services apparently have a profound philosophical disagreement with the deeming policies set forth in the SSI statute and regulations. A state which disagrees can decide, as fifteen other states have, to select the 209(b) option, or it can even decide not to participate in Medicaid. Schweiker v. Gray Panthers, 101 S.Ct. 2837-8. This case presents critical equity problems of inter-state variation; Iowa will not conform to the Medicaid-SSI policies of thirty-three of the thirty-four "SSI states," nor will it conform to the Medicaid spend down policies

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9/ If Iowa chose the 209(b) option and imposed deeming which is not time restricted, Ms. Herweg would be able to spend down and become Medicaid eligible. Herweg v. Ray, 619 F.2d 1290-1.

of fifteen other "209(b)" states.

Iowa has signed a "1634 agreement" under which the federal government pays for and does the administrative task of determining both SSI and Medicaid eligibility, then by computer tape it certifies the individual to the state as Medicaid eligible. See 42 U.S.C. §1383c; 20 C.F.R. 416.2101-.2119. In return, Iowa agrees to accept the SSI policies and the SSA determination of Medicaid eligibility. Ibid. Since Ms. Herweg has no income and since the SSI deeming disregard is time limited if she applied for SSI, she would be eligible and would receive a $25 monthly personal needs allowance. Herweg v. Ray, 619 F.2d 1290-1. She would also be certified to the state as Medicaid eligible and would receive her regular monthly Medicaid card. Because of its 1634 agreement, Iowa does not conduct an independent determination of Medicaid eligibility, and apply its own deeming rules to the categorically needy SSI recipients.